No. 15,994

United States Court of Appeals

For the Ninth Circuit

CHARLES CROWTHER and
IVY L. CROWTHER,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

I. JURISDICTION.

This appeal is from a decision in favor of the Commissioner of Internal Revenue rendered in The Tax Court of the United States, in consolidated proceedings brought by appellants for redetermination of two income tax deficiencies, pursuant to the provisions of I.R.C. Sec. 6213(a).

The decision of The Tax Court of the United States was rendered on December 2, 1957 (R. 176-177). On February 24, 1958, a petition for review was filed with the Clerk of The Tax Court of the United States (R. 178) pursuant to the provisions of I.R.C. Secs. 7482(a) and (b) and Rule 29 of this Honorable Court and within the time provided by I.R.C. Sec. 7484.

Appellants, Charles Crowther and Ivy L. Crowther, filed joint income tax returns for the years in issue, 1951 and 1954. A notice of deficiency was issued by the Commissioner of Internal Revenue for each of said years (R. 8; R. 23). The appellants' petitions for redetermination of each of said deficiencies alleged facts showing jurisdiction in The Tax Court of the United States pursuant to I.R.C. Sec. 6213(a) (R. 1; R. 13).

II. STATUTES INVOLVED.

The 1939 Internal Revenue Code applied to the 1951 proceeding, and the 1954 Internal Revenue Code applied to the 1954 proceeding. The pertinent portions of the 1939 Internal Revenue Code are as follows:

Section 23.

"Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.

1. Trade or Business Expenses.

A. In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * * * * * *

(l) Depreciation.—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income."

Sec. 24. Items Not Deductible.

"(a) General Rule. In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, * * *"

The first sentence of Section 162(a) and Section 162(a)(2) of the 1954 Internal Revenue Code recite precisely the same language as that quoted above from Section 23(a)(1)(A), and there has therefore been no change in the statute.

Section 167(a) of the 1954 Internal Revenue Code, enacted in place of the portion of Section 23(1) of the 1939 Internal Revenue Code quoted above, provides as follows:

"(a) General Rule.—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)

(1) of property used in the trade or business, or

(2) of property held for the production of income."

Section 162 of the 1954 Internal Revenue Code, enacted in place of Section 24(a)(1) of the 1939 Internal Revenue Code quoted above, provides in part as follows:

"* * * no deduction shall be allowed for personal, living, or family expenses."

III. STATEMENT OF CASE.

This proceeding involves the proper determination of appellants' liability for federal income taxes for the years 1951 and 1954.

During said years appellant Charles Crowther (hereinafter whenever a single appellant is referred to, reference is made to Charles Crowther) was employed in cutting down timber and sawing it into logs at designated temporary lay-outs or job-sites in the woods. For both years appellant claimed deductions on his income tax returns for automobile expenses (depreciation, repairs, gas and oil, and insurance) when he owned an automobile or other vehicle solely because he could not maintain his employment without said automobile or other vehicle and when said conveyances were used in appellant's trade or business to transport his tools and equipment to work, house his tools and equipment while he worked in the woods, and to transport him from his "tax home" to temporary job-sites daily.

The Commissioner of Internal Revenue disallowed 80% of the deductions taken for depreciation expense, gas and oil, and insurance for the year 1951, and the entire $125.00 cost of a Plymouth automobile purchased in that year (R. 8-11). The Commissioner of Internal Revenue disallowed all the automobile depreciation claimed in 1954 and disallowed $125.00 of

a total of $313.06 taken for depreciation and repairs to a jeep (R. 23-26). Said conveyances were owned and used for the purposes above set out.

The Tax Court held that the conveyances were used by appellant for the dual purpose of commuting between his home and work and for transporting tools and equipment used by him in his trade or business and increased the amount of the deductions for automobile expenses over that allowed by the Commissioner, but held that said expenses were deductible as ordinary and necessary business expenses only to the extent that said expenses represented the cost of transporting the tools and equipment (R. 172, 174).

Appellants urge that The Tax Court did not allow deductions for a sufficient amount of automobile expenses because said Court failed to allow any deductions for the use of the conveyances in housing tools and equipment in the woods while appellant was there on the job or for transporting appellant from his residence, which in this case constituted his "tax home," to temporary job-sites and return daily, or by reason of the fact that appellant owned the conveyances solely because he could not maintain his employment without them.

Appellants further urge that the deficiency determination for 1951 was arbitrary and unlawful because it was made for the purpose of nullifying the statute of limitations and was so made without any previous audit of appellants' records or any investigation whatever and without furnishing appellants with a 30-day letter as provided by law. The Tax Court held that

it was without jurisdiction to consider the propriety of the administrative policies and procedures employed prior to issuing the notice of deficiency for 1951 (R. 175). Appellants urge that The Tax Court had the jurisdiction to review the procedures employed prior to issuing the notice of deficiency and that if The Tax Court properly exercised its jurisdiction, it would have held the 1951 notice of deficiency invalid.

Therefore, the questions before this Honorable Court are:

1. Did The Tax Court err in disallowing a portion of appellant's automobile expenses on the grounds that said disallowed portion represented a commuter expense?

2. Did The Tax Court err in determining that it had no jurisdiction to review the propriety of the administrative policies and procedures employed by respondent before respondent issued his notice of deficiency for the year 1951?

3. Assuming that The Tax Court had jurisdiction to so review, should it, under the facts of this case, have held that the 1951 notice of deficiency was arbitrary and unlawful?

IV. SPECIFICATION OF ERRORS.

1. The Tax Court erred in disallowing as an income tax deduction a portion of appellant's costs and expenses in operating his automobiles and jeep on the

ground that said disallowed costs and expenses represented a personal commuting expense.

2. The Tax Court's findings of fact for 1951 and 1954 are in error in that the Court did not allow appellants the proper deduction for automobile and jeep costs and expenses incurred for said years (R. 169-171).

3. The Tax Court erred in determining that it had no jurisdiction to review the propriety of the administrative policies and procedures employed by respondent before respondent issued his notice of deficiency for the year 1951.

4. The Tax Court erred in not holding that the 1951 notice of deficiency was arbitrary and unlawful.

V. ARGUMENT.

A. SUMMARY OF ARGUMENT.

The applicable Internal Revenue Code provision provides that traveling expenses, including the entire amount expended for meals and lodging while away from home in pursuit of a trade or business, are deductible for income tax purposes. In *Commissioner v. Flowers* (1946), 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203, the United States Supreme Court established the three conditions that must be satisfied to secure a traveling expense deduction under this code section. In said case, the Supreme Court held that a commute expense is not deductible even if said commute be 300 miles, where said long-range commute is estab-

lished for the personal convenience of the taxpayer. The Court stressed that business trips are to be identified in relation to business demands and the traveler's business headquarters.

We will establish by the facts and applicable law that appellant's traveling expenses satisfied said three conditions required by the United States Supreme Court, and further, that the business headquarters of appellant were in Fort Bragg and that therefore Fort Bragg constituted appellant's "tax home." We will further establish that all the applicable decisions of the courts and the rulings of the Commissioner of Internal Revenue provide that where a taxpayer travels approximately 40 miles a day to various temporary job-sites, said taxpayer is away from home and he is permitted to deduct the cost of traveling from his "tax home" to said temporary job-sites and the cost of returning from said temporary job-site to his home, regardless of whether he makes said round-trips daily or at other intervals. Further, if taxpayer incurred food and lodging expenses at said temporary job-sites, he would be entitled to deduct not only the cost of transportation, but the cost of said food and lodging. We will further show that under the decisions and applicable rules, when a taxpayer travels approximately 40 miles away from his "tax home" on a trip that requires two hours' travel (or four hours' round-trip), the length and duration of such a trip establishes that he is "away from home."

The Tax Court of the United States has the jurisdiction to review the propriety of administrative poli-

cies and procedures employed by the Commissioner of Internal Revenue prior to the Commissioner's issuing his notice of deficiency. The facts will show that an arbitrary deficiency determination was made by the Commissioner of Internal Revenue purely for the purpose of nullifying the statute of limitations, and a determination made for this purpose should not have been sustained by The Tax Court.

B. THE FACTS.

Appellants and their three children resided in Fort Bragg, California, from 1950 to the present (R. 41-45; 70).

During 1951 and 1954, appellant was employed as a "faller" and "bucker," in which employment he cut or sawed down trees and sawed them into marketable logs for a compensation based on a stated amount per thousand board feet of logs (R. 163). Upon appellant's commencing an employment, a portion of timberland or so-called "lay-out" was designated as the site in which he would work (R. 163). When the "lay-out" was cut over, another "lay-out" was designated, and so on until the employer's logging operations were completed (R. 163).

During 1951, appellant worked at three lay-outs (R. 164). The distance traveled by appellant in going from his home in Fort Bragg, California, to the "lay-outs" varied between 42 and 44 miles (R. 164-165). For appellant to reach the "lay-outs" at which he worked, it was necessary for him to drive in a north-

erly direction to Rockport and, after leaving the Fort Bragg to Rockport highway, to travel over one of two routes (R. 43; R. 165). About one-half of one route was a public road and the remainder was an unimproved private logging road. This route required the fording of a creek, which was at an unpassable depth during the winter months (R. 165). The other route, which was used during the winter months, was entirely over an unimproved private logging road. The logging roads were rough, winding and steep (R. 165). Appellant's employer during 1951 did not furnish transportation between the "lay-outs" and the "fallers'" homes (R. 165). There was no public transportation available between appellant's home and the lay-out at which he worked, or between the lay-out and any place where appellant could have lived, nor were there any living accommodations available for appellant or his family at or near the "lay-outs" where he worked (R. 165-167).

During 1954, appellant worked as a "faller" and "bucker" for two different companies. He worked for H. A. Christie Company, Inc. during the first part of 1954 and until July or August of that year, when it completed its logging operations under the contract under which it had been operating (R. 165-166). He worked for said company at two separate "lay-outs" about four miles apart. To reach the "lay-outs" appellant traveled about 30 miles south from Fort Bragg. About one-half the distance was over a public road and the remainder over a private logging road (R. 166).

Within two or three days after the termination of his employment, appellant began working for Hildebrands, Inc., Ukiah, California, and worked for that company through one week in January, 1955, when he was laid off. During the first six weeks of his employment, he worked at a "lay-out" he reached from his home by traveling over 35 miles of a paved road and nine miles of private logging road. Thereafter and until January, 1956, he worked in another "lay-out" which he reached from his home by traveling over 35 miles of paved road and six miles of logging road (R. 166).

Neither of appellant's employers during 1954 furnished transportation between the "lay-outs" and the "fallers' " and "buckers' " homes (R. 166). There was no public transportation between the appellant's home and the lay-out at which he worked or between the lay-out and any place where appellant could have lived, nor were there any living accommodations available for appellant or his family at or near the "lay-outs" where he worked (R. 166-167).

Appellant required two hours per day to drive to the job-site and two hours to return (R. 48).

There was no union or central agency through which appellant secured work, and he secured his jobs by calling on logging operators (R. 66). Fort Bragg was centrally located in the timber area (R. 137-138) and appellant drove approximately 50 miles south, east and north in securing employment (R. 66).

During the years here involved, the appellant's average gross income per day was approximately $40.00

(R. 163). Appellant's employers did not require him to work any specific number of days per week, nor was appellant required to report for work at any particular hour on the days he worked (R. 163). Appellant provided equipment which he used in his employment during 1951 and 1954. This equipment included a chain saw, two bars and chains for the saw, springboards, gun sticks, axes, sledge hammers, from four to fourteen wedges, tools for servicing and repairing equipment, spare parts for on-the-job repairs, and safety equipment (R. 51; 164). In addition, appellant provided lubricating oil for his equipment and a can of gasoline to power his saw (R. 164).

At the end of a day's work, appellant took home his can of gasoline, tools that were broken and needed repairs or tools that needed sharpening, and his spare tools and equipment, and it was rare when equipment was not brought home for repairs (R. 54, 164).

In 1950, appellant purchased a 1947 Cadillac automobile for $2,805.00, which he used during 1951 and 1954. About July, 1951, he purchased for $125.00 a 1937 Plymouth and junked it after using it a year. In November, 1953, he purchased for $400.00 a jeep which he continued to own throughout 1954 (R. 167).

From January, 1951, to July, 1951, appellant used the Cadillac to drive to and from the job-sites. The appellant then used the 1937 Plymouth for said purposes as it was better suited for driving over logging roads. The Cadillac was used when the Plymouth was not in running condition (R. 167).

90% to 95% of the wear and tear on the Cadillac in 1951 was incurred in driving to and from the job-sites, and only 5% to 10% from pleasure use (R. 90-91). The 1937 Plymouth was used exclusively for driving to and from the job-sites (R. 89). The Tax Court allowed only 30% of the wear and tear on the Cadillac as a tax deduction and only 50% of the wear and tear on the Plymouth. (The Plymouth cost $125.00 and was used from July, 1951, to July, 1952. Apparently The Tax Court computed depreciation for six months at $62.50 and allowed $30.00 or approximately one-half, as a tax deduction.) The Tax Court allowed only $140.00 of the $245.55 spent for gas and oil in driving to and from the job-sites and a portion of the car insurance (R. 169).

During 1954 appellant generally used his jeep to drive to and from the job-sites (R. 167). On occasions when the jeep was not in running condition he used the Cadillac for said purpose (R. 168). Appellant had to have a second car available to him as otherwise he would lose a day's work when the first car broke down (R. 93). Such breakdowns were common and occurred at least once a week to the jeep during the latter part of 1954 (R. 93-94). Although the jeep was used exclusively for driving to and from the job-sites, the Tax Court sustained the Commissioner's determination that $125.00 of the $313.06 depreciation and repair expense was non-deductible (R. 170). The Court allowed only 10% of the depreciation on the Cadillac although the non-business use was negligible (R. 94).

It was stipulated that appellants were not furnished with the 30-day letter or auditor's report of proposed adjustments for 1951 (R. 31). There is no evidence to show that the respondent's agents ever interviewed the appellants or the appellants' representatives, or any persons having knowledge of the facts, prior to respondent's making the 1951 deficiency determination. There is no evidence to show that appellants were ever asked to sign waivers extending the statute of limitations. No evidence was offered by respondent as to where an alleged error was found or suspected or that respondent did not have time to proceed with "Procedure for Informal Conference under Reorganization Plan No. 1 of 1952," which procedure was in effect at the time the deficiency was determined. The 1951 determination was made seven days before the statute of limitations would have expired on appellants' 1951 income tax return. The only reasonable inference is that respondent made the arbitrary deficiency determination in 1951 to avoid the statute of limitations.

C. THE LAW.

I. THE TAX COURT ERRED IN DISALLOWING AS AN INCOME TAX DEDUCTION A PORTION OF APPELLANT'S COSTS AND EXPENSES IN OPERATING HIS AUTOMOBILES AND JEEP.

The Tax Court disallowed a portion of appellant's costs and expenses of operating his automobiles and jeep upon the ground that said disallowed portion represented a personal commuting expense under the authority of *Commissioner v. Flowers, supra* (R. 172-

3). In arriving at this conclusion the Tax Court misconstrued the law established by said Supreme Court decision and drew conclusions from it which are contrary to various court decisions and various administrative rulings.

In *Commissioner v. Flowers, supra,* the United States Supreme Court held that three conditions must be satisfied to secure a traveling expense deduction under Section 23(a)(1)(A) 1939 I.R.C., to wit:

> "1. The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> 2. The expense must be incurred while away from home.
>
> 3. The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

In said decision, the Supreme Court sustained the validity of the Commissioner's regulation that commuters' fares are not deductible for income tax purposes, and held that where the taxpayer's permanent business headquarters were in one city and the taxpayer chose for his own personal convenience to live 300 miles from his business headquarters, the taxpayer could not deduct food and lodging expenses in-

curred at the business headquarters nor the cost of traveling between his residence and his business headquarters. This decision did not establish, nor did it claim to establish, that the cost of a taxpayer in traveling from his residence to his work is never deductible, but rather laid down three conditions which must be met before such costs are deductible for income tax purposes. Only by analyzing the decisions and the rulings since the Flowers case, which decisions and rulings involve facts analogous to the facts in the instant case, can we arrive at the correct basis for the decision in this case.

Thus, in *Emmert v. United States,* and *Jasper v. United States* (1955) (consolidated cases), 146 F. Supp. 322, Emmert and his wife lived in Shelbyville, Indiana, which was located 30 miles from Indianapolis, the capital of Indiana. Jasper and his wife lived in Fort Wayne, Indiana, 119 miles from Indianapolis. Both Shelbyville and Fort Wayne were connected to Indianapolis by a main paved highway. Emmert and Jasper were judges of the Supreme Court of Indiana and had taken office in 1946 and 1947 respectively for six-year terms. Under the law of the State of Indiana, one judge was elected from each judicial district and was required by law to reside in the district in which he was elected. Emmert and Jasper complied with the law. The courtroom of the Supreme Court of Indiana was located in Indianapolis, and each judge was provided with an office in the same building in which the courtroom was located. All sessions of court were held in In-

dianapolis, and clerks, typists, court records and adequate research facilities were available only in Indianapolis. Emmert and Jasper prepared their opinions in their chambers in Indianapolis. Judges were authorized to make orders and rulings at their residences when such orders or rulings could by law be made by a single judge, but there was no evidence that Emmert and Jasper performed any services whatever at their residences.

For 1948 and 1949 Emmert deducted for each year automobile expenses for approximately 221 daily round-trips to Indianapolis by automobile. Jasper claimed one-half of his car expenses and $1,369.50 for meals and lodging in Indianapolis during 1949.

The District Court applied the three conditions set down in *Commissioner v. Flowers, supra,* and held that Emmert and Jasper were entitled to the deductions claimed. The Court held that neither of them were commuters under the law because no personal desire, choice or convenience was involved in the expenses. The Court held that Emmert, who chose to travel home almost daily, was not to be penalized because he minimized his business expense by avoiding the expense of lodging.

Faced with this decision, the Tax Court in the instant case said that the Emmert case didn't apply because the judges "were required by the constitution of their state to reside in the district from which they were elected, but who were called upon to render the principal part of their services at the State Capital, which was outside of their districts" (R. 173-174).

The Tax Court in effect said that if the constitution or other law of a state required a taxpayer to incur abnormal traveling expenses between his residence and his place of business, said expenses were deductible. The Tax Court recognized that the Emmert case stated a sound legal principle, yet it approved the case on a narrow interpretation and thus missed the whole point of the case. The District Court in the Emmert case sustained the deduction because it was business necessity, and not personal convenience or desire, that required that Emmert and Jasper incur traveling expenses. The District Court recognized the existence of conditions which caused the traveling expenses, and which conditions could not be overcome by the taxpayer. The fact that said condition was created by state law was not the deciding factor but rather it was the existence of the condition itself, to wit, the fact that it was impossible for the taxpayer to live within reasonable proximity to his work and therefore the expense was incurred away from home in pursuit of business.

During the years 1951 and 1954 appellant worked at seven different sites or "lay-outs" at distances of from 30 to 44 miles from his home, and because of the fact that part of this travel was over rough logging roads, he traveled four hours per day in driving from his home to said sites and return. Appellant could not live nearer his work because there were no living accommodations near his work, and his work was at temporary sites. The law is clear that a taxpayer has no duty to establish his home near a temporary

job-site, and that if he maintains his residence away from said temporary job-site and temporarily lives at the job-site, he can claim as an income tax deduction his board and lodging at the temporary job-site.

Thus, if appellant had temporarily lived at the job-sites, the legal authorities hold without exception that his traveling expenses between his home and each job-site, and room and board at the job-sites, would fulfill the three conditions of *Commissioner v. Flowers.*[1] Due to the absence of living accommodations at the job-sites, appellant's traveling expense was limited to the cost of transportation. If the cost of transportation, and room and board, are deductible under *Commissioner v. Flowers,* certainly the transportation expense incurred alone meets the requirements of that decision.

Appellant could not live nearer his work because of the nature of his work and the nature of the industry in which he was engaged. Thus, in both the

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[1]*Schurer v. Commissioner,* 3 T.C. 544;
Leach v. Commissioner, 12 T.C. 20;
Cooper v. Commissioner, 12 T.C.M. 471;
Robert B. Denning, 14 T.C.M. 838;
J. G. Frazier, Jr. v. Commissioner, 12 T.C.M. 1129;
Stegner v. Commissioner, 14 T.C.M. 1081.

Thus, in *Schurer v. Commissioner, supra,* a journeyman plumber who accepted temporary employment at three different sites during the year, and returned home at the end of each day, was permitted to deduct the amount spent for board and lodging and railroad and bus fares. In *Leach v. Commissioner, supra,* a construction worker was employed for 49 weeks in a single year at places so sufficiently remote from his home that he rented lodgings at each place, and the Tax Court held the lodgings were deductible. Similar principles were applied in *Cooper v. Commissioner, supra, Denning v. Commissioner, supra, Frazier v. Commissioner, supra,* and *Stegner v. Commissioner, supra.*

Emmert case and in the instant case it was necessity that occasioned the daily travel, and not personal desire, choice or convenience. The Tax Court has fallen into the basic error of seizing on the reason for the necessity rather than the necessity itself, as the basis of its decision.

Furthermore, appellant lived in Fort Bragg, which was the place most centrally located with respect to his various "lay-outs" (R. 137-138). Appellant traveled 42-44 miles northerly to his job-sites in 1951 (R. 43; 164-165); 30 miles easterly to two job-sites in 1954 (R. 69-70); 41 to 44 miles southeasterly to three of his other job-sites in 1954 (R. 73-75). He was therefore as centrally located as possible to his various temporary job-sites and thus minimized the expenses of traveling.

In *Moss v. United States* (1956), 145 F. Supp. 10, the taxpayer was a Public Service Commissioner of the State of South Carolina, and, as in *Emmert v. United States, supra,* the taxpayer resided in one district, because the law required that he live in the district in which he was elected, but performed substantially all of his services at the state capital, where the Public Service Commission maintained its offices and its stenographic and technical staffs. The Court held that Moss could deduct his expenses of traveling from his residence to the state capital and return and in addition his board and lodging expenses at the state capital, and said at p. 13:

> "He did not maintain his abode in York away from the offices of the Public Service Commission

in Columbia, for reasons of personal choice or convenience."

The earliest memorandum opinion or ruling appellants have been able to find on the subject of commuting is *Solicitor's Memorandum* 1048, 1 C.B. 101 (1919).

And at p. 102, after discussing what is or is not an expense, the memorandum then states:

"Does the expense incurred by the commuter for transportation to and from his employment meet the test above set forth? Obviously, an individual is free to fix his residence wherever he chooses. He chooses it according to his personal convenience and inclinations, as a matter separate and apart from his business. * * * If he prefers, for personal reasons, to live in a different city from that in which his business or employment is located, any expense incident to so doing is the result of decision based upon personal convenience. * * * "

In *Barnhill v. Commissioner,* 148 F. 2d 913, the Court said at p. 93 relative to the general rule that the cost of going to and from work is not deductible:

"But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of business, but by the action of the taxpayer in having his home, for his own convenience, at a distance from his business. Such expenditures are not essential to the prosecution of the business and are not within the contemplation of Congress, which proceeds upon the as-

sumption that a businessman would live within a reasonable proximity to his business."

The entire gist of the above ruling and decision is that commuting expenses are disallowed because there is no business need for such expenses. It is a free choice of a taxpayer to commute, and he chooses to commute for his personal convenience and inclination. A commuter is one who commutes. Commute means "to travel by use of a commutation ticket, esp. daily to and from a city; hence, to travel, esp. daily to one's work back and forth between a city and one's suburban residence." (*Webster's New International Dictionary, 2nd Edition, Unabridged.*)

Appellant did not travel from the suburbs to a city or from a city to the suburbs. He traveled from his "tax home" to distant temporary job-sites. The key word here is of course "tax home." A travel expense is deductible if incurred while a taxpayer is "away from home" (*Sec. 23(a)(1)(A)—1939 I.R.C.*). What is "away from home"? The Tax Court[2] and the administrative rulings[3] have consistently defined "home" as the taxpayer's place of business. This Honorable Court defined it as the taxpayer's residence.[4] In *Commissioner v. Flowers, supra,* the Su-

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[2]*Tracy v. Commissioner,* 39 B.T.A. 578;
Preddy v. Commissioner, 43 B.T.A. 18;
Schurer v. Commissioner, 3 T.C. 544;
Gustafson, 3 T.C. 998.

[3]I T 1264, I—1 Cum. Bull 122 (1922);
I T 3314, 1939-2 Cum. Bull. 152;
G.C.M. 23672, 1943 Cum. Bull. 66.

[4]*Wallace v. Commissioner* (9th C.A.), 144 F. 2d 407.

preme Court referred to the administrative rulings as follows, at p. 253:

> "Sec. 19.23(a)-2 of Treasury Regulations 103 does not attempt to define the word 'home' although the Commissioner argues that the statement therein contained to the effect that commuters' fares are not business expenses and are not deductible necessarily rests on the premise that home for tax purposes is at the locality of the taxpayer's business headquarters."

The Supreme Court said further at p. 254:

> "Business trips are to be identified in relation to business demands and the traveler's business headquarters."[5]

Where was appellant's place of business or "business headquarters" in 1951 and 1954? In this regard, a letter ruling of the Commissioner of Internal Revenue of May 4, 1956 (Par. 76,519 of 1956 Prentice-Hall Federal Taxes) will be of great aid to this Court. Said ruling provides in part as follows:

> "If such a taxpayer's employment is temporary and so widely scattered that there is no particular city or other reasonably confined area in which he usually works, then his business headquarters may be considered as his 'tax home.' Such factors as the location of a taxpayer's residence, the place where he makes his employment contract, and the locality to which he returns on the termination of temporary employment should be taken into consideration in determining whether the

[5]Unfortunately the Supreme Court did not define "home" in its decision.

> taxpayer has such a business headquarters. * * * If a non-itinerant construction worker has no particular city or other reasonably confined area where he usually works, the cumulative effect of all the facts set out in the paragraph will, it is believed, show that the taxpayer has a business headquarters which may be considered his 'tax home.' "

Appellant's residence was located in Fort Bragg. Fort Bragg was centrally located for securing temporary assignments as a faller and bucker, and appellant sought work by driving approximately 50 miles in each direction from Fort Bragg to secure jobs or to the job-sites after he secured jobs. Certainly Fort Bragg was appellant's business headquarters. The locations of each of his temporary "lay-outs" were not his business headquarters, for if an employee's place of temporary assignment becomes his business headquarters, no employee could ever have a deductible travel expense. Obviously, if the employee's place of temporary assignment becomes the employee's business headquarters and therefore the employee's "tax home," the employee could never be away from home, and since travel expenses are only deductible when an employee is away from home, travel expenses would be denied to every employee. We respectfully ask counsel for respondent these questions:

1. If appellant's business headquarters were not located in Fort Bragg, where were they located?

2. If appellant's tax home was not in Fort Bragg, where was it located?

The letter ruling of May 4, 1956, recites further:

> "The facts may show that the taxpayer (1) has a 'tax home' (his usual place of employment or in the absence thereof, his business headquarters); and (2) is temporarily employed away from such 'tax home.' Where the expenses involved are those incurred for transportation between the 'tax home' and a temporary employment location (or between employment locations) and for meals and lodging at such a temporary location, they are incurred in pursuit of business."

This last quotation from the ruling clearly establishes that if appellant lived at each of the temporary job-sites, his expenses for transportation between his business headquarters, to wit, his residence, and the "lay-outs," and his expenses for meals and lodging, had any been incurred at the said "lay-outs," would be deductible. Certainly the fact that he incurred no meal and lodging expense cannot be the basis for depriving him of a deduction for his transportation expenses.

The Commissioner of Internal Revenue applied similar principles in another ruling (Rev. Ruling 190, 1953—2 C.B. 303). In connection with this ruling the Commissioner was asked whether construction workers who incurred daily transportation expenses between a metropolitan area in which they lived and ordinarily worked and a construction project outside said metropolitan area could take an income tax deduction for such daily transportation expenses. The Commissioner ruled that said expenses were deductible. This ruling is undoubtedly based on the fact

that the workers had a permanent job in the metropolitan area and therefore said area constituted their "tax home" and therefore the daily travel expenses between their "tax home" and temporary job-sites which were outside the limits of their "tax home" were deductible.

Appellant had no permanent job in a metropolitan area, and no permanent job anywhere, and, as has been shown above, his "tax home" was in Fort Bragg. Daily travel between his "tax home" and his temporary job-sites, which were located far outside the equivalent of a metropolitan area, must therefore also be deductible.[6] Certainly if a construction worker who has a "tax home" in San Francisco because his permanent job is located in San Francisco can deduct his daily transportation costs to a temporary job-site outside the San Francisco metropolitan area, another worker, who has a "tax home" in San Francisco because his business headquarters are located in San Francisco, similarly has the right to deduct his daily transportation costs to a temporary job-site or tem-

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[6]That appellant traveled a sufficient distance each day so as to be away from home is supported by the following decisions and rulings:

Waters v. Commissioner, 12 T.C. 414 (a distance of 36 miles was held to be away from home);

Chandler v. Commissioner, 226 F. 2d 467 (a distance of 37 miles was held to be away from home);

Emmert v. United Sttaes, supra (a distance of 30 miles was held to be away from home);

Treasury Department Publication No. 300, *supra* (a distance of 20 miles was deemed to be away from home).

In *Chandler v. Commissioner of Internal Revenue, supra,* taxpayer, a school teacher, was permitted a deduction for the cost of

porary job-sites outside the San Francisco metropolitan area.

In Treasury Department Publication No. 300 (Par. 76,425) 1956 Prentice-Hall Federal Taxes, the Treasury Department stated that the

> "* * * cost of transportation between your residence and your place of employment or business, including commuting expenses, are not deductible except in special circumstances"

and that

> "* * * travel expenses do not include * * * the cost of commuting between the hotel or other place where meals and lodging are obtained and the business location where the services are performed,"

but that

> "* * * however, if the location where the services are performed while on a business trip is in a remote area and you must stay at a considerable distance therefrom (for example, 10 to 15 miles) in order to obtain necessary living accommoda-

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traveling to and from a night school teaching job located 37 miles from the city in which the taxpayer lived and in which he was employed as a school teacher during the day. The Commissioner agreed that the cost of such daily travel in connection with the night job was deductible, but the only question was whether the deduction would be permitted before or after adjusted gross income. That such expenses are of course deductible is unquestioned. They represent the cost of travel between the taxpayer's "tax home" (the place where he was regularly employed) and his place of secondary employment. Such expenses were unavoidable since obviously the taxpayer could not live within reasonable proximity to both jobs. These are the same compelling principles which must permit appellant herein to deduct his daily transportation cost.

> tions, the expense incurred for necessary transportation may be deducted.[7]
>
> * * * * * * *
>
> If you are required to work at a temporary or minor location outside the general area which is your 'tax home,' your transportation expenses for daily round-trips from that area to such temporary or minor post of duty are deductible."

The said Publication No. 300 then gives the example of an employee who has a "tax home" in Nashville, Tennessee, because that is the place of his permanent employment, and said employee is then required to work at a temporary project 20 miles outside the city of Nashville, requiring the employee to incur daily transportation in driving from Nashville to the project and return. The publication makes it clear that the employee may deduct such daily transportation expenses.

Thus, Treasury Department Publication No. 300 clearly recognizes that the cost of traveling between one's residence and one's job is deductible where special circumstances are present. It recognizes that where there are daily transportation expenses between one's "tax home" and a temporary or minor location outside the "tax home," the employee may deduct the cost of such daily round-trips. It recognizes that a distance of 20 miles is of sufficient length to constitute

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[7]Revenue Ruling 54-497, 1954—2 C.B. 75 also provides that where an employee is working at a temporary post of duty, and the temporary post of duty is located in a remote area and the employee must travel 10 or 15 miles to the nearest location where he can obtain living accommodations, transportation expenses so incurred are deductible.

working outside the area of the "tax home." On the basis of this Treasury Department Publication, appellant is completely sustained in his right to deduct his daily transportation costs incurred in driving from 30 to 44 miles from his "tax home" to his place of temporary employment.

Par. 1352 of the Commerce Clearing House 1959 Standard Federal Tax Reporter cites the Commissioner's rules applicable to temporary workers as follows:

> "If you are required to work at a temporary or minor location outside the general area which is your 'tax home,' your transportation expenses for daily round-trips from that area to such temporary or minor post of duty are deductible. For example, an employee who normally works in the city is temporarily assigned to work on a project 20 miles distant from that city, making daily round-trips to his job. The I.R.S. explains that in such case the taxpayer could deduct the transportation expenses for these daily trips, provided the employer did not provide free transportation."

We appreciate that a reference from a tax service is not binding upon this Court, but cite it merely to show that the conclusions we have drawn from the decisions and rulings cited in this brief are the same conclusions drawn in said tax service. Appellants have cited many decisions and rulings which clearly support the right of appellants to deduct the portion of transportation costs allocable to appellant's traveling daily between his home and his work. We assert that respondent cannot cite any decision or ruling to sup-

port its position that such expenses are not deductible. We are aware of the fact that respondent can cite cases which have stated the general rule that the cost of going to and from work is not deductible. It is certainly undeniable that this general rule is subject to exceptions, and in particular the many exceptions referred to in this brief. So we ask respondent not to cite cases which have established the general rule, but rather to cite some decision, some ruling, some authority, to support its contention that a taxpayer who must travel daily a distance of from 30 to 44 miles from his "tax home" to a temporary job-site and return cannot deduct the cost of such transportation. Cases involving long-range voluntary commutes or involving transportation between a man's residence and his permanent place of employment, or travel within the confines of a metropolitan area, are obviously all distinguishable from the facts of the instant case, and if cited to this Court by respondent are of no assistance to the Court. We therefore respectfully urge that, to assist the Court, respondent cite authorities in point with the facts of this case.

II. THE TAX COURT SHOULD HAVE HELD THAT THE 1951 NOTICE OF DEFICIENCY WAS EXCESSIVE AND ARBITRARY AND THEREFORE UNLAWFUL.

Appellants were not furnished with a 30-day letter or auditor's report of proposed adjustment for 1951 (R. 31). No excuse for this failure was offered by respondent. Neither appellants nor their representatives were interviewed by respondent. No request was

made of appellants to sign waivers extending the statute of limitations.

In the absence of any other explanation, the only reasonable inference is that respondent made the deficiency determination for 1951 to avoid the statute of limitations. The question is whether such arbitrary action on the part of respondent should have been sustained by the Tax Court.

The rules for "Procedure for Informal Conference under Reorganization Plan No. 1 of 1952" (see Paragraph 21005—Prentice-Hall 1956 Federal Taxes) provide for the issuance of a 30-day letter together with the auditor's report of proposed adjustments. The taxpayer is given an opportunity to protest and to have the matter heard by the Appellate Division. The various District Directors of Internal Revenue are given the right to depart from this procedure only as follows:

> "10. Nothing contained in this mimeograph shall be construed to preclude the taking of appropriate action where the assessment or collection of the tax is in jeopardy. The procedure described in this mimeograph will not apply in any case in which criminal prosecution is under consideration or in any case in which, in the discretion of the Director of Internal Revenue, the Government's interest would be prejudiced."

In this connection, it should be noted that Regulations and Treasury Decisions on matters of administration of procedure or exercising a discretion conferred by statute have all the force and effect of law, to the same extent as the statute itself *(Stegall*

v. Thurman, 175 F. 813). There is no question but that the Commissioner of Internal Revenue was acting within his authority in promulgating the procedural mimeograph here involved. The procedure therefore must be followed unless the Director of Internal Revenue in a proper exercise of his discretion departs from the procedure to protect the Government's interest. Where such an issue is raised by appellants, respondent is obligated to present facts to show whether or not the discretion was abused. No facts were offered.

Is this discretion of the Director unlimited? Can the local Director of Internal Revenue on April 15, 1959, arbitrarily send notices of deficiency to various taxpayers chosen at random in this district, disallowing percentages of their deductions claimed on their 1955 income tax returns because of the impending running of the statute of limitations for the year 1955? The effect of such an exercise of discretion would be to force the Tax Court instead of the Internal Revenue Service to audit the taxpayers' returns and to clog the Tax Court calendar.

How can the courts compel the Internal Revenue Service to issue notices of deficiency only upon proper investigation? Past criticism of the Internal Revenue Service for improper practices has worked no magic and never will. Only when the courts inform the Internal Revenue Service that no deficiencies will be sustained where such notices were issued arbitrarily merely to keep the statute open, will such practices cease. Was the notice issued arbitrarily in this case?

No investigation, no audit, no examination of records, no interview of appellants or their representative, no request for waiver of the statute of limitations, no 30-day letter, no audit report,—all spells arbitrary action. Appellants recognize that the courts have held that where the Commissioner is conducting an audit, and the impending running of the statute of limitations does not allow an orderly conclusion to that audit, the Commissioner can issue his notice of deficiency to avoid the running of the statute. In this case no audit was ever commenced.

It may be argued that the trial before the Tax Court gave appellants their day in court, and therefore the harm done by the arbitrary assessment was eliminated. However, in *Helvering v. Taylor,* 293 U.S. 507, 55 S. Ct. 287, the Court said at p. 290:

> "We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the Commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing or if liable at all, shows the correct amount."

In the *Helvering v. Taylor* case and in kindred cases, the Court's conclusions were generally based on an arbitrary determination of gross income, but an arbitrary determination of deductions or of gross income results in an equally arbitrary taxable income, and said Supreme Court decision must therefore apply to deductions denied on an arbitrary or irrational basis as well as to gross income determined in such a manner.

In the instant case, in order to determine the deductibility of appellant's cost of transportation between his "tax home" and his various job-sites, it was necessary to know the facts concerning the distance he traveled daily, whether the long distance traveled was traveled because of personal choice and convenience or was due to a necessity created by the nature of his job and the industry in which he was employed, whether each job was of temporary or permanent duration, and all the other factors hereinbefore discussed. None of this information could possibly have been known to the Internal Revenue Service at the time the notice of deficiency was issued, for no investigation had been made. Yet with this complete lack of information, the respondent's agents disallowed 80% of the automobile and other expenses claimed for 1951. This percentage disallowance, based on no facts, then cast upon appellants the cost and the effort involved in filing a petition in the Tax Court to attempt to prove they did not owe the taxes so arbitrarily claimed from them. Such actions on the part of the Internal Revenue Service cannot possibly be sustained by the Courts.

If the Internal Revenue Service had known the facts in 1951, would it have arrived at the same conclusions as it did, acting without information? The answer is in the record. For the taxable year 1954, the Internal Revenue Service made some investigation. As a result, respondent did not disallow any of appellants' deduction for gas and oil, which deduction covered the gas and oil used by appellant in driving from his "tax home" to his various job-sites and

return (R. 170). In 1951, when no investigation was made, the Commissioner disallowed 80% of such expenses (R. 169). In 1954, respondent disallowed approximately 40% of appellant's depreciation and repair expenses in connection with his jeep (R. 170). For the year 1951, the Commissioner allowed not one cent of deduction for the 1937 Plymouth which was used for precisely the same purposes as the jeep (R. 169). For the year 1954, respondent was apparently satisfied that appellant was entitled to deduct the cost of driving from his "tax home" to the job-sites and return, as otherwise respondent obviously would have disallowed some portion of the gas and oil expense claimed! Respondent did disallow 40% of the jeep depreciation and repair expense, which at first blush is inconsistent with the 100% allowance of the gas and oil expense. The notice of deficiency for 1941 refers to the disallowance of said jeep depreciation and repair expense only as "personal expense" (R. 25). The precise reason why respondent deemed said expense to be "personal expense" is not revealed. In any case, the 1954 notice of deficiency shows that respondent had grave doubts about the propriety of disallowing appellant's expenses in driving and using his automobile or other vehicle from his "tax home" to his job-sites and return daily.

As long as the Courts permitted prosecutors to use illegally obtained evidence in criminal cases and merely criticized the police and the prosecutors for improper practices, the police and the prosecutors trampled on constitutional rights and continued to obtain evidence illegally. Once the Courts realized

that wrist-slapping would not work and convictions secured through illegally obtained evidence would be reversed, the improper practices stopped.

We submit that the type of practice here involved will never stop so long as the Courts limit themselves to criticizing respondent. The practice will cease if the Courts refuse to sustain such deficiency determinations as they are made for 1951.

VI. CONCLUSION.

The decision of the Tax Court of the United States for the taxable year 1954 should be modified to allow appellants their proper deduction for automobile and other vehicle expenses for 1954. The decision of the Tax Court of the United States for the taxable year 1951 should be reversed because said decision sustained an arbitrary and unlawful notice of deficiency issued by respondent; or, in the alternative, the Court should modify the decision of the Tax Court for said year to allow appellants their proper deduction for automobile and other vehicle expenses for said year.

Dated, San Francisco, California,
February 25, 1959.

Respectfully submitted,
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